Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-998

RODNEY A. LOGAL, Petitioner

v.

WILLIAM C. CRUSE,
JERRY W. COOK,
BILLY D. MARTIN,
RANDALL CZEKAJ, Respondents

Petition for a Writ of Certiorari to the
Supreme Court of Indiana

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IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1977

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No._____

RODNEY A. LOGAL, Petitioner

v.

WILLIAM C. CRUSE,
JERRY W. COOK,
BILLY D. MARTIN,
RANDALL CZEKAJ, Respondents

Petition for a Writ of Certiorari to the Supreme Court of the State of Indiana

Rodney A. Logal, Petitioner prays that a Writ of Certiorari issue to review the judgments of the Supreme Court of Indiana entered in the above case on October 13, 1977.

OPINIONS BELOW

The Memorandum opinion of the Court of Appeals of Indiana, Third District was issued on September 9th, 1976 and is unreported and copies thereof are appended to this petition in the Appendix at

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pp. 21-22. The opinion of the Court of Appeals of Indiana, Third District in the companion case is reported in ___Ind.App.___, 338 N.E.2d 309 and is found in the Appendix at pp. 11-20. The Court of Appeals of Indiana denied Rehearing on both appeals without opinion on December 1, 1976 and February 23rd respectively. The Supreme Court of Indiana consolidated both appeals on April 18th, 1977 and granted transfer with an opinion on October 13th 1977 which is reported at ___Ind.___, ___N.E.2d___ and is found in the Appendix at pp. 29-42.

JURISDICTION

The opinion of the Supreme Court of Indiana was made and entered on October 13th, 1977 and copies thereof are appended to this petition in the Appendix at pp. 29-42. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

In a suit for personal injury, the respon-

dents sought, under Indiana Trial Rule 30, to take the discovery deposition of the petitioner's doctor. The petitioner had previously signed a medical authorization. Without the petitioner's knowledge or consent, his attorney of record opposed the proceeding. Respondents filed a motion to compel discovery, which was granted. The petitioner's counsel refused to comply and thwarted the deposition. The Trial Court, upon motion, awarded one thousand, two hundred dollars as sanctions, pursuant to Indiana Trial Rule 37, to be paid within thirty days. At the expiration of that time, the case was dismissed with prejudice

After discovering the dismissal, the petitioner secured new counsel and attempted to secure reinstatement, pursuant to Indiana Trial Rule 60(B) and 41(F), which was denied. Two appeals were perfected, one of which was dismissed, and the other affirmed by the Indiana Court of Appeals. Rehearing on both appeals was denied by the Court of Appeals. The Supreme Court of Indiana granted

transfer, modified the procedure for Trial Rule 60(B) motions, and affirmed both the dismissal with prejudice and the Trial Court's refusal to reinstate. The questions presented are:

1. Whether the provisions of Indiana Trial Rule 37, providing sanctions on failure to make discovery, must be read and applied within the framework of the Constitutional protections and guarantees provided the petitioner under the 5th and 14th Amendments to the Constitutions of the United States.

2. Whether the dismissal and subsequent refusal to reinstate the petitioner's cause of action, under the circumstances, violated the petitioner's Constitutional rights under the 5th and 14th -- -- Amendments to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND TRIAL RULES INVOLVED

The 5th Amendment to the Constitution of the United States provides, in part, as follows:

> "No person shall be held to answer.... nor be deprived of life, liberty, or property without due process of law;...."

The 14th Amendment to the Constitution of the United States, Section 1, reads, in part, as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside....Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Indiana Trial Rule 37 reads in pertinent part as follows:

> (A) Motion for order compelling discovery. Upon reasonable notice to the other parties and all persons affected thereby, a party may apply for an order compelling discovery as follows: ....
>
> (B) Sanctions--Contempt, damages and default. To avoid abuse of discovery proceedings and to secure enforcement or protective proceedings under the discovery provisions of these rules or upon motion and notice by a party, witness or person to any persons affected thereby: ....
>
> (2) The court may allow expenses, including reasonable attorney's fees, incurred by a pary, witness or person, against a party, witness or person, responsible for

unexcused conduct that is: ....

(c) in bad faith and abusively resisting or obstructing a deposition, interrogatories, production of evidence, inspection, examination, request, question, enforcement order, subpoena, protective order or any other remedy under the discovery provisions of these rules.

(4) The court may enter total or partial judgment by default or dismissal with prejudice against a party who is responsible under subdivision (B)(2) of this rule if the court determines that the party's conduct has or threatens to so delay or obstruct the rights of the opposing party that any other relief would be inadequate.

Indiana Trial Rule 41(F) reads as follows:

Reinstatement of dismissal. For good cause shown and within a reasonable time the court may set aside a dismissal without prejudice. A dismissal with prejudice may be set aside by the court for the grounds and in accordance with the provisions of Rule 60(B).

The pertinent provisions of Trial Rule 60(B) may be found in the Appendix in Judge Staton's dissent on pp. 16-17.

STATEMENT OF THE CASE

On May 14th, 1969, the petitioner was involved in a chain-reaction bype collision near the

intersection of Cline Avenue and I-94 in Hammond Lake County, Indiana. On May 6th, 1971, the petitioner filed a lawsuit in Lake Superior Court which was subsequently venued to Porter County, Indiana. The petitioner, at one time, was offered the sum of $25,000.00 to settle his claims.

After the initiation of the lawsuit, the respondents commenced discovery proceedings. The petitioner had previously executed a medical release and the deposition of Dr. Saavedra, the petitioner's physician was scheduled for August 7th, 1972. That deposition was cancelled and re-noticed for the 26th day of January, 1973. On January 25th, at approximately 3:30 P.M. the respondent Martin's attorney received a call from an individual who identified himself as Mr. Brown from Mr. Crumpacker's office who stated that his office would file objections to the taking of the depostion. The respondent's attorney indicated that he would proceed with the deposition until he received a protective order

signed by the court. The same date, Dr. Saavedra's office was contacted (by a person believed to be Mr. Brown) and advised not to proceed with the deposition because petitioner's counsel had filed a Motion to Quash.

At the time and place of the deopostion, Mr. Brown, from Attorney Crumpacker's office, and who was not a lawyer licensed to practice law, appeared and again instructed and advised Dr. Saavedra not to proceed with the deposition in question. At that point, Dr. Saavedra refused to testify. On March 6th the respondent Martin filed a Motion to compel Discovery under Indiana Trial Rule 37 and asked for sanctions. This Motion was set for hearing several times and continued by Attorney Crumpacker. The hearing was held on October 26th, 1973, with all parties present except respondent's attorney. The court's order granting discovery and imposing sanctions may be found in the Appendix at pp. 1-2. The order provided that the sanctions were to be paid within

thirty days and when they were not paid, the court entered an order dismissing the petitoner's cause of action with prejudice. That order may be found in the Appendix at pp. 2-3.

At no time was the petitioner advised of the orders or proceedings against him. Upon learning of the dismissal, approximately seven months later, the petitioner secured new counsel, filed a motion pursuant to Indiana Trial Rules 41(F) and 60(B) to reinstate his cause of action. That motion and supporting affadavits may be found in the Appendix at pp. 5-9. As indicated in the petition and affadavit, Logal was not aware of the proceedings, was advised by his former counsel, Crumpacker, that things were proceeding normally, that he did not authorize his attorney's conduct, and that he was willing to pay the sanctions to secure reinstatement of his cause of action. That petition was denied and the order may be found in the Appendix at pp. 3-4.

The constitutional questions concerning the

5th and 14th Amendments were raised by Crumpacker in a motion to correct errors and may be found in the Appendix at pp. 10. The Court of Appeals did not address those issues in its opinion and they were preserved by petitioner's new counsel in Petitions for Rehearing and Transfer. The Court of Appeals denied rehearing without opinion and the Supreme Court of Indiana granted transfer, modified the procedure to Trial Rule 60(B) motions, and affirmed the actions of the Trial Court in dismissing the cause of action and denying reinstatment, but continued to ignore the constitutional questions raised. All three opinions may be found in the Appendix.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because the Constitutional questions raised by the petitioner, have never been addressed by the trial court, the Court of Appeals or the Supreme Court of the State of Indiana. The questions raised have been referred to and were approached in Hovey v. Elliot

167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215; Hammond Packing Company v. State of Arkansas, 212 U.S. 322, 29 S.Ct. 270, 53 L.Ed. 530; and Link v. Wabash Railroad Company, 370 U.S. 626, 8 L.Ed.2d 734, 82 S.Ct. 1386.

The right of the trial court to enforce discovery and provide for the orderly development of lawsuits versus the constitutional rights of unwitting parties not directly responsible for misconduct must be weighed. Trial Rule 37 provides for severe sanctions which may be imposed by a trial court in the event a person fails to comply or attempts to abuse the discovery process. However those sanctions must be applied in a constitutionally proper manner. This is not to say that a client may not be bound by the actions of his attorney or bound by notice to his attoney in most matters. However, when that attorney abandons the normal procedures of the law and becomes charged with misconduct, unethical conduct, or, as here an abuse of the recognized discovery process, so as to

invite sanctions and dismissal, the client is entitled to additional constitutional protection to insure that his rights and property are protected. (The disciplinary proceedings against Owen Crumpacker for unethical conduct and mis-conduct remain pending at this time)

Since the constitutional issues raised were not addressed by any of the lower courts, their decisions cannot be addressed within the framework of this petition.

This Court, however, has faced the issue of dismissal for failure to prosecute under Federal Rule of Civil Procedure 41(b). It held in a 4-3 decision in Link v. Wabash Railroad Company, supra, that such dismissal was not constitutionally prohibited. However, this petition embraces two additional points, not present in Link, which carry it beyond the proscriptions of the 5th and 14th Amendments.

First, the trial court entered a monetary award against the petitioner without any form of

process or notice, except to his attorney, whom the court acknowledged, had already acted in bad faith.

Second, the petitioner, after becoming aware of the situation, filed a petition to reinstate his cause of action, under Indiana Trial Rule 60(B) which was denied. In Link, supra, Mr. Justice Harlan seems to have relied upon the fact that Link never sought to avail himself of the escape hatch provided by Trial Rule 60(b), which he felt rendered the lack of notice inconsequential. With the denial of the petitioner's Rule 60(B) motion, the lack of notice to the petitioner clearly leads to the loss of a valuable property right without due process.

Both the petitioner's and the respondent's rights to adequate discovery procedures and the court's power to enforce those procedures are acknowledged. However, the Federal Court system has consistently applied sanctions against the party who is directly responsible for hindering those procedures. Sanctions are imposed against the of-

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fending attorney for his conduct, not to be taxed as costs nor charged against the client.

The fundimental rule that notice to an attorney constitutes notice to the client is unreasonable in Trial Rule 37 sanctions by the very nature of the proceeding. To assume that the attorney, having been sanctioned for his misconduct, will advise the client of the pending award and the threat of dismissal, completely ignores the previous conduct of the attorney which generated the sanctions. If he had followed the rules and obeyed the orders issued by the court, the sanctions would never have been awarded.

It is not unreasonable to require a direct notice to a client that a threat of dismissal hangs over his head for the conduct of his attorney. Such a rule would protect the client's basic constitutional rights under the 5th and 14th Amendments concerning fundamental notice and due process prior to the loss of property.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

SUPREME COURT OF THE UNITED STATES

October Term, 1977

RODNEY A. LOGAL,
Petitioner

v.

WILLIAM C. CRUSE,
JERRY W. COOK,
BILLY D. MARTIN,
RANDALL CZEKAJ,
Respondents

On Writ of Certiorari

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ORDERS APPEALED FROM

COURT OF APPEALS
NO. 3-675 A 106

The Trial Court on or about the 26th day of October, 1973, entered the following order, omitting formal parts:

> Comes now the defendant, William C. Cruse, by counsel, Karen Hughes. Comes now the defendant, Billy D Martin, by counsel, Fred Stults, Jr., (sic.) and comes now defendants William Cruse and Randall Czekaj by counsel Rudy Lozano. Comes now Dr. Bernard Saavedra in person and by counsel, Martin H. Kinney. The plaintiff, Rodney A. Logal does not appear in person or by counsel. It is now shown to the Court that Plaintiff's counsel has been notified by ordinary mail of today's hearing.
>
> Cause submitted to court. Argument now heard on Motion Compelling Discovery and for Sanctions Against Plaintiff and Dr. Bernardo Saavedra.
>
> Court now being advised in the premises grants Defendant's Motion to Take the Deposition of Dr. Saavedra.
>
> The Court further finds that defendants have substantially complied with the Indiana Rules of Court in regard to the taking of the deposition of Dr. Saavedra and the Court finds that the Plaintiff through its attorney has substantially failed to comply with the Indiana Rules of Civil Procedure and that said failure has not been in good faith. Pursuant to Indiana Trial Rules, the Court does now grant

to the Defendants sanctions against the plaintiff, Court further grants to the counsel of various defendants, reasonable attorney's fees in the amount of $1,200.00 to be divided among defendants' counsel by agreement or upon failing to reach an agreement, the Court will make a division of said attorney fees and will consider Affidavits by counsel prior to said division.

IT IT FURTHER FOUND AND ORDERED that said $1,200.00 is to be paid into the Clerk's office on or before November 7, 1973 by plaintiff or plaintiff's counsel. Should plaintiff or plaintiff's counsel fail to comply with said sanctions on or before November 7, 1973, the Court will enter an order of dismissal in this cause with prejudice and direct costs against the plaintiff.

ALL OF WHICH IS ORDERED, ADJUDGED AND DECREED by this Court this 26th day of October, 1973.

/s/B.W. Douglas, Judge
PORTER SUPERIOR COURT

The trial Court subsequently on November 9, 1973, dismissed the appellant's cause of action which order is as follows:

> Plaintiff herein having failed to comply with the sanctions imposed by this Court in the allotted time, the court does now dismiss this cause with prejudice.
>
> ALL OF WHICH IS SO ORDERED, ADJUDGED AND DECREED by this court this 9th day of November, 1973.
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this court that this cause be dismissed for plaintiff's failure to comply with sanctions as ordered by the court.
>
> /s/B.W. Douglas, Judge
> PORTER SUPERIOR COURT

The order denying the Petitioner's Motion to Correct Errors reads, omitting formal parts, as follows:

> The plaintiff's Motion to Vacate or in the Alternative to Correct Errors was heard by the Court on March 14, 1974.
> Plaintiff has failed to submit Memorandum of Brief as directed at that time. The Court now denies Plaintiff's Motion to Correct Errors and Motion to Vacate.
>
> ALL OF WHICH IS SO ORDERED, ADJUDGED AND DECREED this 9th day of April, 1974.
>
> /s/B.W. Douglas, Judge
> PORTER SUPERIOR COURT

COURT OF APPEALS

NO. 3-773 A 120

The Trial Court on or about the 21st day of January, 1975, entered the following order, omitting formal parts:

> Comes now the plaintiff by counsel Mike Muenich

Come now defendants by counsel Karen Hughes, Dale Custer and Sam J. Bernardi. This cause is now submitted to court on Petition to Reinstate filed by plaintiff. Arguments heard on this Petition. Petition to Reinstate is now denied. All of which is ORDERED, ADJUDGED AND DECREED by this Court this 21st day of January, 1975.

/s/B.W. Douglas, Judge
PORTER SUPERIOR COURT

The order denying the Petitioner's Motion to Correct Errors reads, omitting formal parts, as follows:

Comes now the plaintiff, Rodney A. Logal, by counsel, and files Motions to Correct Errors in the within cause of action in the following words and figures, to-wit: (H.I.).

And the court having examined same and being duly advised in the premises, now denies said Motion...."

/s/ B.W. Douglas
JUDGE, PORTER SUPERIOR COURT

(Order entered March 18th, 1975)

STATE OF INDIANA)		IN THE PORTER
)	SS:	SUPERIOR COURT
COUNTY OF PORTER)		
RODNEY A. LOGAL	)	
	)	
Plaintiff	)	
	)	
-vs-	)	CAUSE NO. 71 PSC 1734
	)	
WILLIAM C. CRUSE, et al	)	
	)	
Defendants	)	

PETITION TO REINSTATE

Comes now the plaintiff, by his attorney, Michael L. Muenich, and shows the court:

1. That on or about the 26th day of October, 1973, this court entered a certain order, a copy of which is attached hereto, made a part hereof and marked as Exhibit A, a portion of which granted to the various defendants, sanctions in the form of reasonable attorney fees in the amount of One Thousand Two Hundred Dollars ($1,200.00) which sum was to be paid on or before November 7, 1973.

2. That said order further provided for dismissal on November 7, 1973 for failure to comply with said judgment amount and that said case was,

in fact, dismissed at that time.

3. That pursuant to plaintiff's affidavit, attached hereto, made a part hereof and marked as Exhibit B, Rodney A. Logal was not advised of the sanctions entered against him, was not advised of the dismissal and further, was not kept advised of the status of his proceedings.

4. That pursuant to said affidavit, the plaintiff first became aware of the status of this case in August of 1974.

5. That the plaintiff was not aware of the actions of his counsel and at no time sanctioned or authorized such conduct and further, has, since being advised of the judgment and dismissals entered against him, retained new counsel to protect his interests herein.

6. That the plaintiff did, on or about October 25, 1974, file a request for investigation with Mr. Richard H. Grabham, Executive Secretary of the Indiana State Bar Association, which ivestigation is now pending before the local Bar Association Grievance Committee.

7. That your plaintiff is willing, should the court so order, to tender the sum of One Thousand Dollars ($1,200.00) to the court, pursuant to this Court's Order of October 26, 1973.

8. That pursuant to Trial Rule 41 of the Indiana Rules of Trial Procedure, and Trial Rule 60 of the Indiana Rules of Trial Procedure, your plaintiff now petitions the court for good cause hereinabove set forth to reinstate these proceedings; that this court set a hearing on plaintiff's petition for reinstatement; and for all other just and proper relief in the premises.

/s/Michael L. Muenich
MICHAEL L. MUENICH
Attorney for Plaintiff
5231 Hohman Avenue
Hammond, Indiana 46320

/s/Rodney A. Logal
RODNEY A. LOGAL

Exhibit B

STATE OF INDIANA)
) SS:
COUNTY OF PORTER)

IN THE PORTER SUPERIOR COURT

RODNEY A. LOGAL

-vs-) CAUSE NO. 71 PSC 1734
)
WILLIAM C. CRUSE, et al)
)
Defendants)

AFFIDAVIT

Comes now the plaintiff, Rodney A. Logal and being first duly sworn upon his oath, deposes and says:

1. That he was the plaintiff in a cause of action arising out of an automobile accident on the 16th day of May, 1969 the same being captioned Rodney A. Logal vs. William C. Cruse, et. al.

2. That in connection with such incident, the plaintiff retained Owen W. Crumpacker of Hammond, Indiana to represent him in said cause of action.

3. That your deponent did, from time to time, contact his counsel regarding these proceedings and was advised that the case was proceeding in a normal manner.

4. That in August, 1074, the plaintiff discovered that his case may have been dismissed and sanctions entered against him.

5. that upon investigation, your deponent

determined that his case had been dismissed and udgment entered against him in the amount of One Thousand Two Hundred Dollars ($1,200.00).

6. That at no time prior to making such discovery was the plaintiff aware of sanctions being entered against him or the dismissal of the above captioned cause of action.

7. That at no time prior to August, 1974, was the affiant apprised of the status of the proceedings regaring the various orders and entries of the court subsequent ot August, 1973.

FURTHER YOUR AFFIANT SAITH NOT.

/s/Rodney A. Logal
RODNEY A. LOGAL

Subscribed and sworn to before me, a Notary Public this 10th day of December,1974.

/s/Michael L. Muenich
Notary Public

My commission Expires:
9/1/75

EXCERPTS FROM MOTION TO
CORRECT ERRORS

(5) Plaintiff's cause of action represents a valuable property right, being a chose in action, of which the insurance companies conducting the defenses for and on bahalf of the named defendants were fully aware, said insurance company or companies having previously, offered $25,000 to settle the plaintiff's claim. The dismissal of the case, without notice or hearing, constitutes the deprivation of the plaintiff, Rodney Logal, of his property without due process of law as guaranteed him the the Fourteenth Amendment of the United States Constitution and similar provisions of the Indiana State Constitution.

******

(20) Plaintiff respectfully represents that the award of $1,200, without notice or hearing, constitutes a deprivation of plaintiff's property without due process of law. Plaintiff as unaware of the order and had no opportunity to obtain the $1,200 or to pay it into the clerk's office on or before November 7, 1973.

IN THE
COURT OF APPEALS OF INDIANA

THIRD DISTRICT

RODNEY A. LOGAL, Plaintiff-Appellant v. WILLIAM C. CRUSE, JERRY W. COOK, BILLY D. MARTIN, RANDALL CZEKAJ, and WILLIAM J. MAHAN, Defendants-Appellees	)	No. 3-675 A 106 DECIDED DECEMBER 8, 1975

APPEAL FROM THE PORTER SUPERIOR COURT
HONORABLE BRUCE W. DOUGLAS, JUDGE

ON APPELLEES' MOTIONS TO DISMISS

HOFFMAN, JUDGE.

Defendants-appellees William C. Cruse, Billy D. Martin and Randall Czekaj have filed separate motions to dismiss this appeal, alleging that the trial court was without jurisdiction to enter a judgment. Plaintiff-appellant Rodney A. Logal has not responded to such motions.

The record of this cause discloses that on November 9, 1973, the Porter Superior Court dismissed an action between these parties for the

plaintiff Logal's failure to comply with certain sanctions previously ordered by such court. An appeal was perfected from that judgment and is presently pending in this court as Cause No. 3-73 A 120.

After such appeal was perfected to this court, Logal obtained new counsel who filed in the trial court a "Petition to Reinstate" such action pursuant to Ind. Rules of Procedure Trial Rule 60(B). Such petition was denied. Logal then filed a motion to correct errors directed to the denial of such petition. This motion was overruled and the present appeal was perfected.

-Appellees contend that after the first appeal was perfected by the filing of the record of the proceedings in this court, the trial court lost its general jurisdiction over the cause, and had no jurisdiction to entertain Logal's "Petition to Reinstate." A long line of precendential case law is supportive of this position.

In Westfall v. Wait (1903), 161 Ind. 449, at 451, 68 N.E. 1009, at 1010, our Supreme Court

stated:

> "It seems to be thoroughly settled by the decisions of the American courts that an appeal from a final judgment rendered generally upon the issues in a cause, when properly perfected, carries the whole case embraced within the final adjudication absolutely from the jurisdiction of the trial court to the appellate tribunal. Elliott, App. Proc. 541. The rule is tersely stated in the text of 2 Ency. Pl. & Pr. 327, thus: 'Where an appeal has been perfected, the jurisdiction of the appellate court over the subject-matter and parties attaches, and the trial court has no power to render any further decision affecting the rights of the parties in th cause until it is remanded.' Citing many authorities. In State, ex rel., v. Kolsem, 130 Ind. 435, 14 L.R.A. 566 this court used the following language: 'If the appellees had perfected their appeal, there could be no doubt that the case would have been entirely removed from the jurisdiction of the trial court.'
>
> "at the bottom of the rule is the infeasibility of two courts having authority over the same case at the same time. ***."

Similarly, see: Lake County Department, etc. v. Roth, (1961), 241 Ind. 603, 174 N.E.2d 335;

State v. Gurecki (1954), 233 Ind. 383, 119 N.E.2d 895;

Farmers L. & T. v. Manning et al. (1968),

142 Ind. App. 519, 236 N.E.2d 52;

Kragulac et al. v. Marich et al. (1967), (on petition for rehearing), 142 Ind.App. 529, 549, 236 N.E.2d 58 (transfer denied).

This rule was recently reaffirmed by our Supreme Court in Bright v. State (1972), 259 Ind. 495, 289 N.E.2d 128. In Bright, the appellant had filed an appeal from his conviction, and during the pendency of such appeal returned to the trial court to file a petition for post-conviction relief. Upon the denial of such petition, he filed a second appeal. Our Supreme Court dismissed such subsequent appeal, stating:

> "At the time the appellant filed his motion to correct errors and transcript of record in this Court in the first appeal, the entire cause was removed from the trial court to this Court thereby depriving the trial court of any further jurisdiction over the action. 2 I.L.E. Appeals 231 (1957). We, therefore, hold the appellant was premature in filing his verified motion for post-conviction remedy in the trial court at a time when the same cause of action was pending in this Court on appeal." (At 496 of 259 Ind., at 129 of 289 N.E.2d)

Similarly, in the case at bar when Logal perfected his appeal from the original judgment of dismissal by filing the record of the proceedings

with the clerk of this court, the trial court lost its general jurisdiction of the case. thus, the purported proceedings on Logal's "Petition to Reinstate" in the trial court were a nullity, and this attempted appeal must be dismissed.

The motions to dismiss heretofore filed in this cause are sustained, and this appeal is dismissed.

Appeal dismissed.

GARRARD, J. CONCURS WITH OPINION.

STATION, P.J. DISSENTS WITH OPINION.

GARRARD, J., Concurring

Because of the recent reaffirmance in Bright v. State (1972), 259 Ind. 495, 298 N.E.2d 128, of the doctrine that the trial court loses jurisdiction to further review tis decision after and appeal is perfected and while it pends, I am compelled to concur in the dismissal.

However, I join Judge Staton in believing that while several courts should not be simultaneously engaged in reviewing a decision, some procedure

should be adopted which would protect the losing party's access to the various remedies provided by our codes of procedure and permit consolidation of the issues presented so that a prompt and efficacious determination may be reached.

STATON,P.J. Dissenting

I dissent. Indiana Rules of Procedure, Trial Rule 60(B) permits a motion to be filed within a year after judgment.[1] The Rule provides in part:

> "(B) Mistake--Excusable neglect-- Newly discovered evidence--Fraud, etc. On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order, default or proceeding for the following reasons:
>
> (1) mistake, surprise, or excusable neglect;
>
> (2) any ground for a motion to correct error, including without limitation newly discovered evidence, which by due diligence could not have been discovered in time to move for a motion to correct errors under Rule 59;
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) judgment by default was entered against such party who was served only by publication and who was without actual knowledge of the

> action and judgment, order or proceedings;..."

These expressed purposes of the Rule should not be frustrated or forfeited by an appeal from the trial court's first appealable judgment[2] which has a singularly different purpose--correction of an alleged error committed during trial which has been brought to the trial court's attention. A new procedural Rule is needed for a functional TR. 60(B) where an appeal has been taken from the trial court's judgment.[3]

Several solutions have been adopted by the federal courts. First, the Rule 60(B) movant presents his grounds for relief to the court of appeals, and it decides whether the cause should be remanded for a hearing on the motion. Weiss v. Hunna (2d Cir. 1963), 312 F.2d 711, cert. denied, 83 S.Ct. 1920, 374 U.S. 853, 10 L.Ed. 2d 1073; Zig Zag Spring Co. v. Comfort Spring Corp. (3d Cir. 1953), 200 F.2d 901. Second, the Court of Appeals grants permission to the trial court to hear the Rule 60(B) motion. Dispulse Corp. of America v. Curtis Pub. Co. (2d Cir. 1967), 374 F.2d 442. Third,

if the Rule 60(B) motion is filed with the trial court and it indicates that the motion will be granted, then the movant may make an application to the Court of Appeals for remand of the cause to the trial court. Iannarelli v. Morton (3d Cir. 1972), 463 F.2d 179; Canadian Ingersoll-Rand Co. v. Peterson Prods. of San Mateo, Inc. (9th Cir. 1965), 350 F.2d 18; Aune v. Reynders, (10th Cir. 1965), 344 F.2d 835; Ryan v. U.S.Lines Co., (2d Cir. 1962), 303 F.2d 430; Binks Mfg. Co. v. Ransburg Electro-Coating Corp.(7th Cir. 1960), 281 F.2d 252, cert dismissed, 81 S.Ct. 1091, 366 U.S. 211, 6 L.Ed. 2d 239. Fourth, a Rule 60(B) movant is permitted to appeal from the denial of his motion. The appeal from the original judgment and the denial of the Rule 60(B) motion are considered at the same time and as a single appeal by the court of appeals. Ferrell v. Trailmobile, Inc. (5th Cir. 1955), 223 F.2d 697; Aune v. Reynders, supra; Binks Mfg. Co. v. Ransburg Electro-Coating Corp. supra.

In Ferrell v. Trailmobile, Inc., supra,

223 F.2d at 699, the court suggested the following rationale:

> "...A party who considered himself entitled to relief both under Rule 60(B) and also by appeal, might, on occasion, be required to elect between the two remedies, if appeal deprived the district court of jurisdiction to consider the motion under Rule 60(B). The construction suggested by the Seventh Circuit makes both remedies available, and we think that is the right course. We think, therefore, that this Court has jurisdiction to consider not only the appeal from the original final judgment, but the appeals from the judgment denying relief under Rule 60(B)..."

I would deny the motion to dismiss and consolidate both appeals. Final dispostion of litigation in which a TR. 60(B) motion has been filed would be advanced and the certainty of a forced election avoided.

---

1 TR. 60(B) provides in part:
"The motion shall be made within a reasonable time, and for reasons (1),(2),(3) and (4) not more than one (1) year after the judgment, order or proceeding was entered or taken...."

2 TR. 56(C). A summary judgment on less than all the issues. Al see TR. 54.

3 Bright v. State (1972), 259 Ind. 495, 289 N.E.2d 128, is not applicable to a

TR. 60(B) one-year limitation. The purpose for filing post-conviction relief is different from the TR. 60(B) purpose. Secondly, a TR. 60(B) is generally used in civil rather than criminal cases.

IN THE
COURT OF APPEALS OF INDIANA

THIRD DISTRICT

RODNEY A. LOGAL, Plaintiff-Appellant	)	
v.	)	No. 3-774 A 120
WILLIAM C. CRUSE, JERRY W. COOK, BILLY D. MARTIN andRANDALL CZEKAJ,	)	DECIDED SEPTEMBER 29, 1976
Defendants-Appellees	)	NOT FOR PUBLICATION

APPEAL FROM THE PORTER SUPERIOR COURT
Honorable Bruce W. Douglas, Judge

STATON, P.J. MEMORANDUM DECISION

Rodney A. Logal (Logal), plaintiff below, appeals from a dismissal with prejudice under Indiana Trial Rule 37(B)(4). Finding no abuse of discretion, we affirm.

I.

Facts

After considerable strife[1] over the taking of a physician's deposition, one defendant filed a a Motion to Compel Discovery and requested sanc-

tions under Indiana Trial Rule 37. The trial court, at a hearing on this motion (which hearing neither Logal nor his attorney, Owen Crumpacker, attended), found that Logal had, through Crumpacker:

> "...substantially failed to comply with the Indina Rules of Civil Procedure and that said failure has not been in good faith.
> Pursuant to Indiana Trial Rules, the Court does now grant to Defendants, reasonable attorney's fees in the amount of $1,200.00 to be divided among Defendants' counsel by agreement.
> ...
> IT IS FURTHER FOUND AND ORDERED that said $1,200.00 is to be paid into the Clerk's office on or before November 7, 1973 by Plaintiff or Plaintiff's counsel. Should Plaintiff or Plaintiff's counsel fail to comply with said sanctions on or before November 7, 1973, the Court will enter an ORDER OF DISMISSAL in this cause with prejudice and directs (sic) costs against the Plaintiff.
>
> ALL OF WHICH IS SO ORDERED, ADJUDGED AND DECREED by this Court this 26th day of October, 1973.
>
> AND AFTERWARDS, TO-WIT: On the 9th day of November, 1973.
> Plaintiff herein having failed to comply with the sanctions inposed by this Court in the allotted time, the Court does now dismiss this cause with prejudice."

Logal, on December 21, 1973, file a Motion to Vacate and Set Aside the Entry of November 9,

1973, and correct errors. A hearing was held on this motion, March 14, 1974, and evidence and arguments were presented. The court took the matter under advisement and requested that briefs be submitted within two weeks. Logal failed to submit any brief, and on April 9, 1974, the court denied Logal's Motion to Vacate and Motion to Correct Errors.

II.

Sanctions

Trial Rule 37(B) provides in pertinent part:

> (B) Sanctions--Comtempt, damages and default. To avoid abuse of discovery proceedings and to secure enforcement of the discovery provisions of these rules in any enforcement or protective proceedings under the discovery provisions of these rules or upon motion and notice by a party, witness or person to any persons affected thereby:
> ***
> (2) The court may allow expenses, including reasonable attorney's fees, incurred by a party, witness or person, against a party, witness or person, responsible for unexcused conduct that is:
> ***
> (c) in bad faith and abusively resisting or obstructing a deposition,...or any other remedy under the discovery provisions of these rules.
> ***

> (4) The court may enter total or partial judgment by default or dismissal with prejudice against a party who is responsible under subdivision (B)(2) of this rule if the court determines that the party's conduct has or threatens to so delay or obstruct the rights of the opposing party that any other relief would be inadequate...."

In Clark County State Bank v. Bennett (1975) ___Ind. App.___, 336 N.E.2d 663 at 668, Dean Harvey was quoted with reference to what constitutes bad faith under TR. 37. "(B)ad faith' certainly does not contemplate conduct which is deliberate or by design. Far less than that,..." (Emphasis added.) Here, evidence exists which could have supported a finding that Logal's actions were deliberate, thus the money sanction imposed by the trial court was proper under Trial Rule 37(B)(2)(c).

The trial court gave Logal the opportunity to comply with the sanction before it dismissed the cause with prejudice. Even after the order dismissing the cause was entered (two days after the given deadline), the court heard arguments on Logal's Motion to Vacate and offered Logal an opportunity to submit a supporting brief. Logal

did not submit a supporting brief, yet he complains on appeal that the trial court abused its discretion. We do not agree. Rather, from a close reading of the transcript, we conclude that the trial court was tolerant and temperate in its attempts to preserve Logal's rights in the original lawsuit.

Trial Rule 37(B) is an enforcement provision by definition. Dismissal with prejudice is its ultimate tool. The trial court tried to avoid the dismissal. The trial court stated at the Motion to Vacate hearing:

> "I feel very sorry for this Mr. Logal and I really thought that you would probably in some way get this sanction straightened out and I wouldn't have to dismiss the cause.... I don't like to enter sanctions and enter orders like I entered, it puts me on the spot in a way. But these other people have the same rights you have to have the rules followed.... (Logal) can't file a case as the plaintiff and serve everybody and forget it. He has an obligation to diligently prosecute his civil action. He can waive his rights."

This is a correct statement of the law. Farinelli v. Campagna (1975), ___Ind.App.___, 338 N.E.2d 299; Clark County State Bank v. Bennett, supra

There was no abuse of discretion in dismissing the

cause; we affirm.

HOFFMAN, J. and GARRARD, J., Concur.

---

[1] It is neigher necessary nor constructive to here delineate the sequence of events which preceded Logal's Motion to Quash the deposition. The Motion to Quash was not sustained, but the taking of the deposition was thwarted.

EXCERPTS FROM
PETITION FOR REHEARING
AND
TRANSFER

The reason said question is claimed to have been decided erroneously is as follows:

A. The effect of the ruling by the Court of Appeals effectively denies the appellant due process of law when in fact there is no showing upon the record that any of the actions complained of are directly attributable to the appellant, Rodney A. Logal.

B. The effect of the ruling by the Court of Appeals denies the appellant, Rodney A. Logal, of due process in that despite the reputation of counsel for the appellant, Rodney A. Logal, and indications upon the record of the lack of knowledge of the appellant, no notices were forwarded to Rodney A. Logal in person nor at any time was an attempt made to notify Rodney A. Logal of the sanctions nd judgment entered against him or the proceedings to determine same.

C. The effect of the ruling of the Court of Appeals is to transfer the liability and sanctions

for the conduct of an appellant's former counsel to the appellant when in fact the actions of appellant's counsel were outside the scope of his employment as set forth in the Code of Professional Responsibility.

****

4. The opinion of the Court of Appeals fails to give a statement in writing of a substantial question arising on the face of the record.

The substantial question claimed to have been avoided is as follows:

****

B. In the alternative, whether or not a trial court may dismiss a party's cause of action without giving the appellant personal, formal notice of such proceedings either by certified main, return receipt requested, or by other means available to the court, to insure that a party has actual knowledge of the proceedings and the ability to provide for the payment of sanctions into court.

****

Identical issues were presented to the Supreme Court on Petition to Transfer.

IN THE
SUPREME COURT OF INDIANA

RODNEY A. LOGAL, Appellant, v. WILLIAM C. CRUSE, JERRY W. COOK, BILLIE D. MARTIN, RANDALL CZEKAJ and WILLIAM J. MAHAN, Appellees.	CONSOLIDATED SUPREME COURT NO. 1077 S 746
RODNEY A. LOGAL, Appellant, v. WILLIAM C. CRUSE, JERRY W. COOK, BILLIE D. MARTIN, RANDALL CZEKAJ and WILLIAM J. MAHAN, Appellees.	DECIDED OCTOBER 13, 1977

ON PETITION TO TRANSFER

DeBruler, J. --

The Porter Superior Court dismissed an action by appellant Logal because of Logal's failure to comply with an order that he make available his

physician for a deposition by the appellee-defendants. Logal filed a motion to correct errors challenging the dismissal as an abuse of discretion. After that motion was overruled he perfected his appeal in cause number 3-774 A 120 in the Court of Appeals.

During the pendency of that appeal, Logal filed with the trial court a motion under Ind. R. Tr. P. 60(B) seeking reinstatement of the suit. This Motion was overruled, resulting in appeal number 3-675 A 106. The Court of Appeals affirmed the judgment of dismissal and dismissed the appeal from the denial of the Rule 60 motion of the grounds that the trial court lost jurisdiction over the matter upon the filing of the initial appeal. The Court of Appeals relied on Bright v. State, (1972) 259 Ind, 495, 289 N. E. 2d 128, in which this Court held that a trial court lacked jurisdiction to entertain a petition under the Post-Conviction Rules while the petitioner's direct appeal was pending.

We have accepted transfer of these appeals, which have been consolidated at appellant's request, in order to clarify the procedure appropriate when an appellant seeks to raise a Trial Rule 60(B) challenge to a judgment against which an appeal has been taken.

I.

Trial Rule 60(B) allows a party to obtain relief from a judgment against him from the trial court, for various enumerated reasons. Most 60(B) grounds must be raised within a year of judgment; all must be raised within a reasonable time.

The Federal Rules of Civil Procedure contain an analogous Rule 60(b). As Judge Staton points ut in his dissent below, the federal courts have developed several alternative procedures for consideration of motions under their Rule 60(b) during the pendency of appeals. Logal v. Cruse, (1975) ___ Ind. App. ___, 338 N.E. 2d 309, 311-12. The procedure enjoying greatest currency among the federal courts calls for an appellant seeking

relief under Rule 60 to file his motion with the district court; if the district court indicates an inclination to grant the motion, the appellant applies to the circuit court of appeals for a remand of the case to the district court for action on the 60(b) motion. See 11 C. WRIGHT and A. MILLER, FEDERAL PRACTICE AND PROCEDURE 2873 at 265-66 (1973).

Significant differences between Indiana and federal civil procedure have convinced this Court to adopt an alternative procedure, employed in a minority of federal courts. See Weiss v. Hunna, (2d Cir. 1963) 312 F 2d. 711, cert. den'd 374 U.S. 853, 83 S. Ct. 1920, 10 L. Ed. 2d 1073. An appeal in most federal cases is initiated by the filing of a notice of appeal, ordinarily required within thirty days of judgment. Fed. R. App. P. 4(a). The district court loses jurisdiction to grant a 60(b) motion upon filing of the notice. Zigzag Spring Co. v. Comfort Spring Corp., (3d Cir. 1953) 200 F.2d 901. The filing of a motion for new trial

under Fed. R. Civ. P. 59 or for judgment n.o.v. under Fed. R. Civ. P. 50 extends the time for filing the notice, but these motions are optional. Thus in federal court the time available for discovery of 60(b) grounds will ordinarily be limited to thirty days.

In our courts, in contrast, any party wishing to appeal must file a motion to correct errors within sixty days of judgment. Ind. R. Tr. P. 59(C) and (G). After denial of the motion the appellant has a total of ninety days to file the record with the appellate court. Ind. R. App. P. 3(B). Not until the record is filed does the trial court lose jurisdiction. Bright v. State, supra. Thus not until 150 days after judgment exclusive of the time during which the motion to correct errors is under consideration, see Ind. R. Tr. P. 53.1(A), is the trial court ordinarily divested of its jurisdiction. Trial Rule 59 allows inclusion of the grounds for relief enumerated in Rule 60(B)(1) to (3), all of which are subject to the one-year limitation, in

the motion to correct errors. Ind. R. Tr. P. 59(A). Rule 60 (B) requires motions thereunder to be filed ithin a reasonable time, which may be less than one year, and our Court of Appeals has held that only grounds which could not have been included in the motion to correct errors can be advanced in a Rule 60(B) motion. Warner v. Young America Fire Dept., (1975) ____Ind. App. ___, 326 NE.2d 831. It appears from this collation of rules that in Indiana courts a party has a significantly longer time to present Rule 60(B) grounds to the trial court than his counterpart in federal court, and that meritorious motions for relief from judgment during the pendency of an appeal from that judgment are likely to be less frequent in our system.

Therefore we adopt the following procedure for disposition of 60(B) motions while the judgment is on appeal.

(1) The moving party files with the appellate court an application for leave to file his 60(B) motion. This application should be verified and

should set forth the grounds relied upon in a specific and non-conclusory manner.

(2) The appellate court will make a preliminary determination of the merits of the movant's 60(B) grounds. In so doing the appellate court will determine whether, accepting appellant's specific, non-conclusory factual allegations as true, there is a substantial likelihood that the trial court would grant the relief sought. Inasmuch as an appellate court is not an appropriate tribunal for the resolution of factual issues, the opposing party will not be allowed to dispute the movant's factual allegations in the appellate court.

(3) If the appellate court determines that the motion has sufficient merit, as described in the preceding paragraph, it will remand the entire case to the trial court for plenary consideration of the 60(B) grounds. Such remand order will terminate the appeal and the costs in the appellate court will be ordered taxed against the party procuring the

remand. The decision to remand does not require the trial court to grant the motion. Caribou Four Corner, Inc. v. Truck Ins. Exchange, (10th Cir. 971) 443 F.2d 796. If the trial court denies the otion, the movant should file a motion to correct errors addressed to this denial, Hooker v. Terre Haute Gas Corp., (1974) ___Ind.___, 317 N.E.2d 878, and appeal the denial. In this new appeal any of the issues raised in the original appeal may be incorporated, without being included in the second motion to correct errors.

(4) If the trial court grants the motion, the opposing party may appeal that ruling under the same terms as described in paragraph (3). The original appeal shall be deemed moot.

(5) If the appellate court denies the application for remand, that ruling may be assigned as grounds for rehearing and, where appropriate, transfer.

We believe that this procedure will allow full and fair consideration of grounds for relief from judgment with a minimum of disruptions of the ap-

pellate process. For purposes of illustration and in the interests of fairness, we will consider Logal's 60(B) motion as though it were an application made in accordance with the procedure outlined today.

II.

Logal's action was dismissed as a sanction for non-compliance with a discovery order. Logal had been ordered to produce his physician for deposition; neither Logal, his attorney, or physician appeared. The trial court ordered Logal to pay $1,200 in costs to the defendants, whose attorneys had appeared for the deposition with a court reporter. When the costs were not paid, the trial court dismissed the action pursuant to Ind. R. Tr. P. 37(B)(4).

Logal asserts that he was not personally served with the order and therefore had no notice of the impending dismissal. He does not deny that his attorney received such notice. Indiana R. Tr. P. 5 provides:

"Whenever a party is represented by an attorney of record, service shall be made upon such attorney...."

Service upon an attorney of record constitutes notice to the party represented. State ex rel. Brubaker v. Pritchard, (1956) 236 Ind. 222, 138 N.E.2d 233, 60 A.L.R. 1239. Therefore, accepting Logal's assertions as true, we find no substantial likelihood of success in his advanced grounds for relief.

III.

In cause 3-675 A 106, Logal contends that the trial court abused its discretion in dismissing his action. We cannot agree. The trial court was aced with unexcused disregard of its discovery orders, and imposed the maximum sanction authorized by our Rules. Indiana R. Tr. P. 37 provides for this sanction when "the court determines that the party's conduct has or threatens to so delay or obstruct the rights of the opposing party that any other relief would be inadequate." We cannot say that a conclusion to this effect by the trial court

is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." State ex rel. Steers v. Holovachka, (1957) 236 Ind. 565, 575, 142 N. E. 2d 593, 597; McFarlan v. Fowler Bank & City Trust Co. (1938) 214 Ind. 10, 14, 12 N.E.2d 752, 754,

Appeals 3-774 A 120 and 3-675 A 106 are transferred to this Court. The judgments of the Porter Superior Court dismissing this action and denying appellant's motion for relief from the judgment are affirmed.

Prentice and Pivarnik, JJ., concur; Givan, C.J., concurs in result; Hunter, J., concurs in part and dissents in part with opinion.

HUNTER, J. - Concurring in part, dissenting in part.

I concur with the majority opinion that the taking of an appeal should not preclude a party from pursuing its remedies under Ind. R. Tr. P. 60(B) however, I am in disagreement as to the procedure

to be followed. In selecting the particular method that it did, the majority chooses to reject a procedure used by a majority of the federal courts for one that has been referred to as an anomaly by legal commentators. (WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE 2878 at 263-264.)

The procedure which I would adopt is similar to that followed in the majority of the federal courts:

1. The movant would file a motion for relief with the trial court. Simultaneously a certified copy is sent to the Court of appellate jurisdiction. Upon receipt of that motion, the appeal is held in abeyance and further jurisdiction in the pending matter is extended to the trial court as a fact-finder.

2. Notification by the trial court of its determination.

(a) If the trial court intends to grant the motion, it notifies the court of appellate

jurisdiction which would remand the appeal to the trial court for granting.

(b) If the trial court determines to deny the motion, it may do so without remand from the motion, it may do so without remand from the court of appellate jurisdiction. If the moving party desires, it may appeal the denial of its motion and said ruling is merged into the appeal on the merits.

The above procedure has been recognized as promoting true judicial economy. See: HARVEY, RULES AND RULINGS FOR THE TRIAL LAWYER, 18 RES GESTAE 21 (November 1974); Washington v. Board of Education School District 89, (7th Cir. 1974); 498 F.2d 11; Wright, supra, Ryan v. U.S.Lines Co., (C.A.2d, 1962) 303 F2d 430, 434. It eliminates the further burdening of the appellate system with a preliminary review before remanding to the trial court for a ruling on the merits of the motion. This duplication of judicial effort is both unecessary and undesirable.

I would therefore grant transfer and adopt the procedure set forth in this opinion.

Supreme Court, U.S.
FILED
FEB 8 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-998

RODNEY A. LOGAL,

Petitioner,

vs.

WILLIAM C. CRUSE, JERRY W. COOK, BILLY D. MARTIN and RANDALL CZEKAJ,

Respondents.

BRIEF OF RANDALL CZEKAJ IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-998

RODNEY A. LOGAL,

Petitioner,

vs.

WILLIAM C. CRUSE, JERRY W. COOK, BILLY D. MARTIN and RANDALL CZEKAJ,

Respondents.

BRIEF OF RANDALL CZEKAJ IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Randall Czekaj, Respondent prays that a Writ of Certiorari to review the judgments of the Supreme Court of Indiana in the above case on October 13, 1977 be denied.

OPINIONS BELOW

Petitioner's statement of the Opinions delivered in the Courts below is substantially correct.

JURISDICTION

Petitioner seeks to invoke jurisdiction of this Court under 28 U.S.C. 1257 (3).

Rule 19, Federal Rules - Supreme Court, provides *inter alia,* that a review on a writ of certiorari is not a matter of right, and will be granted only where there are "special and important reasons" therefore. Petitioner has failed to allege any "special or important" reasons. Moreover, Petitioner has failed to state in his petition any of the "character of reasons" for such review which are specified in Rule 19. Respondent asserts that sufficient jurisdictional grounds, as provided by the rules, have not been stated by Petitioner. The writ should, accordingly, be denied.

CONSTTTUTIONAL PROVISIONS AND TRIAL RULES INVOLVED

Petitioner's abstract statement of parts of the 5th Amendment to the Constitution and the 14th Amendment, Section 1 are correct. Indiana Trial Rule 37 A, B(2), C(4) and Trial Rule 41(F) are correctly recited.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct. Respondent would supplement such statement by adding that throughout all of the Trial Court, Appellate Court and Supreme Court of Indiana proceedings, Petitioner was at all times represented by counsel.

Respondent further states that in addition to the failures of Petitioner to comply with pertinent Indiana Trial Rules referred to in Petitioner's Petition, the Trial Court, after hearing lengthy arguments on the Motion to Correct Errors, granted Petitioner the right to file a brief in support of his position which Petitioner also failed to file.

QUESTIONS FOR REVIEW

The sole question for review simply stated is, whether the Supreme Court of Indiana's affirmation of the Appellate Court of Indiana's decision that the Trial Court did not err in granting Respondent's Motion to Dismiss and imposing Sanctions for Petitioner's failure to make discovery, was violative of the 5th and 14th Amendments to the Constitution of the United States. The Petitioner does not attack the Constitutionality of the invoked Indiana Trial Rules, which are patterned after the Federal Rules, or the right of the trial court to enforce such rules, but attacks the enforcement of the same against this particular plaintiff by the respective Indiana Courts.

ARGUMENT

I.

RESPONSE TO THE CONTENTION THAT THE INDIANA COURT'S ENFORCEMENT OF ITS TRIAL RULES RELATING TO DISCOVERY IN A CIVIL ACTION VIOLATED THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

The Indiana Trial Rules provide for discovery in civil actions similar to that provided in the Federal Rules; Petitioner was represented at all times by counsel in the Trial Court and the respective appeals courts of Indiana, including the highest appellate tribunal, the Supreme Court of Indiana.

Petitioner concedes that "Both the petitioner's and respondent's rights to adequate discovery procedures and *the Court's power to enforce those procedures are acknowledged*" (Petitioner's Brief, Page 13) (Italics ours). Moreover, Petitioner does not assert that the Trial Court *did not have sufficient and adequate grounds to enforce the rule by dismissing petitioner's action and denying the Petitioner's Trial Rule 60(B) motion to reinstate.* (Italics ours). The bottom line of petitioner's argument is apparently predicated on this premise: A client may not be bound by the actions of his attorney or bound by notice to his attorney, when the attorney abandons the normal procedures of law and becomes charged with an abuse of the recognized discovery process, but is entitled to additional constitutional protection to ensure that his rights and property are protected. (Petitioner's Brief, Pages 11 and 12) Ironically, petitioner does not identify those constitutional protections, does not cite one authority in support thereof, and, in fact, presents no cogent argument supporting the premise. Petitioner does make mention of *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 8 L. Ed.2d 734, 82 S.Ct. 1386; however, in *Link,* supra, the Court disavowed the very theory petitioner now expounds. The Court stated:

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent.
>
> Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney." *Smith* v. *Ayer,* 101 U.S. 320, 326, 25 L.Ed. 995.

The Court in *Link,* supra, further stated:

> And if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. But keeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the defendant.

Petitioner further alludes to *Hammond Packing Co.* v. *Arkansas,* 212 U.S. 322, 330, 29 S.Ct. 270, 53 L.Ed. 530 which, again, supports denial of the petition in this case. The Court in substance stated,

> "as the power to strike an answer out and enter default . . . which is before us, is clearly referable to the undoubted right of lawmaking authority to create a presumption in respect to the want of foundation of

> an asserted defense against a defendant who suppresses or fails to produce evidence when legally called upon to give or produce, *our opinion is that the contention that the section was repugnant to the Constitution of the United States is without foundation.*" *Hammond Packing Co.*, supra, at 353, 354.

The Trial Court in this action rightfully exercised its discretion in dismissing plaintiff's action in accordance with Trial Rule 37. The soundness of this judicial decision was affirmed by both the Appellate and Supreme Court of Indiana. This Court has clearly held in *Link* v. *Wabash etc.*, supra, and *Hammond Packing Co.* v. *State of Arkansas,* supra, that such judicial decision does not violate the Constitution of the United States. Petition should, accordingly, be denied.

II.

WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE NO SUBSTANTIAL FEDERAL QUESTION WAS PRESENTED OR DECIDED.

Petitioner's sole issue presented has been heretofore posited as follows: A client may not be bound by the actions of his attorney or bound by notice to his attorney, when the attorney abandoned the normal procedures of law and becomes charged with an abuse of the recognized discovery process, but is entitled to additional constitutional protection to ensure his rights and property are protected. (Petitioner's Brief, Pages 11 and 12).

To afford the basis for review, either by appeal or certiorari, the federal question upon which the state court judgment hinges must be *substantial. Zucht* v. *King,* (1922) 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194; *Tidal Oil Co.* v. *Flanagan,* (1924) 263 U.S. 444, 44 S.Ct. 197, 68 L.Ed. 382. The Court in *Zucht,* supra, stated:

> But, although the validity of a law was formally drawn in question, it is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not, and was not at the time of granting the writ, substantial in character. *Sugarman* v. *United States,* 249 U.S. 182, 184. *Zucht,* supra, at 176.

One of the attributes of a substantial federal question is the novelty of the question being presented to the Court. In the case of *Patterson* v. *Stanolind Oil & Gas Co.,* 305 U.S. 376, 83 L.Ed. 231, 59 S.Ct. 259, this Court was confronted with a decision on appeal, which decision was consonant with well settled principles of law. The Court in *Patterson* stated:

> "In that view, the state court applied well settled principles in denying plaintiff's contentions under the 14th Amendment. . . . The argument that regulatory provisions of the statute authorizing the commission to make its order fixing the drilling unit are void for indefiniteness, is without merit.
>
> In the light of our previous decisions, the plaintiff has failed to raise a substantial federal question, and the appeal is dismissed for want of jurisdiction."

Thus, if a question has been previously adjudicated by this court upon well settled principles, no substantial federal question is presented.

This Court has previously determined the issues raised by petitioner in *Link* v. *Wabash R. R. Co.,* supra, and *Hammond Packing Co.* v. *State of Arkansas,* supra. *Link,* supra, clearly refutes the proposition that a client is not bound by the acts of his attorney in failing to comply with the court's trial rules resulting in dismissal of his action. *Hammond Packing Co.* v. *State of Arkansas,* supra, decided that dismissal of an action for failure to comply with

trial rules by a trial court, is not violative of the 5th and 14th Amendments to the Constitution. Accordingly, no substantial federal question exists and this petition for certiorari should be denied.

III.

THERE ARE NO SPECIAL AND IMPORTANT REASONS TO GRANT CERTIORARI.

Rule 19 of this court provides in part that review on writ of certiorari will be granted only where there are "special and important reasons therefor." The "character of reasons" for granting the writ are therein outlined, none of which are here invoked, nor does petitioner state the character of reason which should be considered by the Court in this case.

Are there special and important reasons for granting the writ here? This case simply involves the enforcement of the Indiana Trial Rules and affirmance of the Trial Court's action by the Court of last resort in Indiana. There is no statute involved; moreover, petitioner does not contest the constitutionality of the discovery rules involved, or the Court's right to enforce them. His only contention is that the Court should not enforce the rules against him.

Even assuming, *arguendo*, that the decision of the Indiana state court is erroneous, this is not a matter of "substance" in the constitutional sense. This Court does not sit for the benefit of particular litigants. *Magnum Import Co.* v. *Coty*, (1922) 262 U.S. 159, 69 L.Ed. 922, 32 S.Ct. 531. As Mr. Justice Frankfurter pointed out:

> "Special and important reasons imply a reach to a problem beyond the academic or episodic. This is especially true where the issues involved reach constitutional dimensions . . ." *Rice* v. *Sioux City Memorial Park Cemetery*, (1955) 349 U.S. 70, 74, 99 L.Ed. 897, 75 S.Ct. 614.

Writ of certiorari should be used sparingly to bring up cases of public importance. This case does not have the "surface appearance of public importance." *Rice* v. *Sioux City Memorial Park Cemetery*, supra.

CONCLUSION

Respondent respectfully submits that this case is not a proper one for review by certiorari by this Court, and that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U. S.
FILED
FEB 8 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-998

RODNEY A. LOGAL,

Petitioner,

vs.

WILLIAM C. CRUSE, JERRY W. COOK, BILLY D. MARTIN and RANDALL CZEKAJ,

Respondents.

BRIEF OF BILLY D. MARTIN IN OPPOSITION TO PETITION FOR CERTIORARI

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ARGUMENT

I.

Petitioner requests this court to review two questions set forth on page 4 of the petition. Respondent, Martin, responds to these questions as follows:

1) Petitioner argues that the due process protection afforded by the 5th and 14th Amendments to the Constitution (Pet. 5) necessitates *personal* notice to a party and that notice to his attorney, pursuant to Ind.

R.T.P. 5 (A37-38) was not sufficient protection as against the sanctions of fees and dismissal imposed by the trial court, pursuant to Ind. R.T.P. 37(B) (4), (Pet. 5-6) for thwarting the discovery process.

Due process requires an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the protection afforded by the Constitution. Notice was given petitioner by serving his attorney as required by Ind. R.T.P. 5 (A37-38). A hearing was provided petitioner by the trial court prior to the imposition of sanctions. Petitioner is bound by the acts of his lawyer-agent and is considered to have notice of all facts and notices chargeable to the attorney. Respondents diligently prosecuted their portion of the action, complied with the rules, and should not bear the burden nor suffer the consequences of the acts of petitioner or his attorney. Petitioner's remedy, if any exists, is against his attorney for malpractice.

Link v. Wabash Railroad Co., (1962) 370 U.S. 626, 8 L. Ed. 2d 734, 82 S. Ct. 1386;
Hammond Packing Co. v. State of Arkansas, (1909) 212 U.S. 322, 53 L. Ed. 530;
Hovey v. Elliott, (1897) 167 U.S. 409, 17 S. Ct. 481, 42 L. Ed. 215.

Petitioner, on page 12 of his petition, maintains that two points not present in the *Link* case justify a review by this court. First, the trial court entered a monetary award against petitioner. This contention has no merit as such action is authorized by both federal and state procedure. See F.R.C.P. 37(d) and Ind. R.T.P. 37 (B) (2)—(Pet. 5). It has been approved by the Indiana courts. *Clark County State Bank v. Bennett* (1975), 336 N.E. 2d 663 (668), ... Ind. App. .....; *Brutus v. Wright* (1965), 324 N.E. 2d 165 (171), ... Ind. App. ..... .

Secondly, petitioner claims that a lack of *personal* notice coupled with the trial court's denial of his petition to reinstate his cause of action constitutes a loss of property without due process and justifies review by this court. This contention also has no merit. In the *Link* case, there was no notice given prior to entering the sanction of dismissal. In our case, notice was given to petitioner's attorney as required by the rules. Further, petitioner's request for reinstatement of his cause was filed with the trial court after an appeal had been perfected and the trial court no longer had jurisdiction to act. (A30) Even so, in the interest of fairness, the Indiana Supreme Court considered the petition to reinstate and rejected it. (A31)

2) Petitioner argues that the constitutional rights guaranteed him by the 5th and 14th Amendments to the Constitution of the United States were violated by the dismissal of his action and the subsequent refusal to reinstate the action.

Petitioner had perfected an appeal of his case prior to the filing of the petition to reinstate with the trial court. The trial court was without jurisdiction to act on the request for reinstatement. (A30) The Indiana Supreme Court, in the interest of fairness, considered the petition for reinstatement but denied same. (A37-38) No facts or circumstances are shown which would warrant a holding by this court that the Indiana Supreme Court's decision denying petitioner's 60 (B) motion for reinstatement was such an abuse of its discretion as to constitute a denial of petitioner's constitutional rights. See *Link v. Wabash, supra*, page 635.

II.

For the reasons set forth above, respondent, Billy D. Martin, requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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Billy D. Martin

Supreme Court, U. S.
FILED
FEB 10 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-998

RODNEY A. LOGAL	PETITION FOR WRIT
Petitioner	OF CERTIORARI
VS	TO THE SUPREME
WILLIAM C. CRUSE,	COURT OF INDIANA
JERRY W. COOK,	
BILLY D. MARTIN,	CONSOLIDATED
RANDALL CZEKAJ	SUPREME COURT
Respondents	NO. 1077 S 746

Brief Of Respondent, William C. Cruse

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 77-998

RODNEY A. LOGAL Petitioner VS WILLIAM C. CRUSE, JERRY W. COOK, BILLY D. MARTIN, RANDALL CZEKAJ Respondents	PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA CONSOLIDATED SUPREME COURT NO. 1077 S 746

BRIEF OF RESPONDENT, WILLIAM C. CRUSE

I

JURISDICTION

The jurisdiction to review this cause on a Petition for Writ of Certiorari does not lie with this Court in that the decision of the Supreme Court of the State of Indiana is supportable as a matter of state law and, further, any question presented therein is not a substantial federal question as is required by the rules of this Court.

II

CONSTITUTIONAL PROVISIONS AND TRIAL RULES

In addition to the constitutional provisions and trial rules set forth by the petitioner in his Petition for Writ of Certiorari to the Supreme Court of Indiana, pages 4-6, Trial Rule 5(B) of the Indiana Rules of Civil Procedure is pertinent to the just adjudication of the issues involved therein. Trial Rule 5 of the Indiana Rules of Civil Procedure in pertinant part reads as follows:

> (B) Service: How made. Whenever a party is represented by an attorney of record, service shall be made upon such attorney unless service upon the party himself is ordered by the court. Service upon the attorney or party shall be made by delivering or mailing a copy of the papers to him at his last known address.
>
> (1) Delivery. Delivery of a copy within this rule means
>
> (a) handing it to the attorney or party;

(b) leaving it at his office with a clerk or other person in charge thereof, or if there is no one in charge, leaving it in a conspicuous place therein; or,

(c) if the office is closed, by leaving it at his dwelling house or actual palce of abode with some person of suitable age and discretion then residing therein.

(2) Service by mail. If service is made by mail, the papers shall be deposited in the United States mail addressed to the person on whom they are being served, with postage prepaid. Service shall be deemed complete upon mailing. Proof of service of all papers permitted to be mailed may be made by written acknowledgement of service, by affidavit of the person who mailed the papers, or by certificate of an attorney. It shall be the duty of attorneys when entering their appearance in a cause or when filing pleadings or papers therein, to have noted on the bench docket or said pleadings or papers so filed the address and telephone number of their office. Service by delivery or by mail at such address shall be deemed sufficient and complete.

In order to easily compare the provisions of Trial Rules 60(B) and 37(B) of the Indiana Rules of Civil Procedure to Trial Rule 60(b) and 37(b) and (d)

of the Federal Rules of Civil Procedure, respectively, each is set out herein. Trial Rule 60(B) of the Indiana Rules of Trial Procedure is as follows:

> (B) Mistake--Excusable neglect--Newly discovered evidence--Fraud, etc. On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order, default or proceeding for the following reasons:
>
> (1) mistake, surprise, or excusable neglect;
>
> (2) any ground for a motion to correct error, including without limitation newly discovered evidence, which by due diligence could not have been discovered in time to move for a motion to correct errors under Rule 59;
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) judgment by default was entered against such party who was served only by publication and who was without actual knowledge of the action and judgment, order or proceedings;
>
> (5) except in the case of a divorce decree, the record fails to show that such party was represented by a guardian or other representative, and if the motion asserts

and such party proves that

(a) at the time of the action he was an infant or incompetent person, and

(b) he was not in fact represented by a guardian or other representative, and

(c) the person against whom the judgment order or proceeding is being avoided procured the judgment with notice of such infancy or incompetency, and, as against a successor of such person, that such successor acquired his rights therein with notice that the judgment was procured against an infant or incompetent, and

(d) no appeal or other remedies allowed under this subdivision have been taken or made by or on behalf of the infant or incompetent person, and

(e) the motion was made within ninety [90] days after the disability was removed or a guardian was appointed over his estate, and

(f) the motion alleges a valid defense or claim;

(6) the judgment is void;

(7) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is

based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(8) any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2), (3) and (4) not more than one [1] year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or for fraud upon the court. Writs of coram nobis, coram vobist, audita querela, and bills of review and bills in the nature of a bill of review, are abolished and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Trial Rule 37(B) of the Indiana Rules of Civil Procedure is as follows:

(B) Sanctions--Contempt, damages and default. To avoid abuse of discovery proceedings and to secure enforcement of the discovery provisions of these rules in any enforcement or protective proceedings under the discovery provisions of

these rules or upon motion and notice by a party, witness or person to any persons affected thereby:

(1) The court may enforce the attendance of witnesses by attachment, and punish disobedience of a subpoena or order issued or made under these discovery rules as a contempt of court in the manner as provided in Rule 45(F).

(2) The court may allow expenses, including reasonable attorney's fees, incurred by a party, witness or person, against a party, witness or person, responsible for unexcused conduct that is:

(a) punishable for disobedience of a subpoena or order under subdivision (B) (1) of this rule; or

(b) in bad faith and abusively making or seeking a deposition, interrogatories, production of evidence, inspection, examination, request, question, enforcement order, subpoena, protective order or any other remedy under the discovery provisions of these rules; or

(c) in bad faith and abusively resisting or obstructing a deposition, interrogatories, production of evidence, inspection, examination, request, question, enforcement order, subpoena, protective order or any other remedy under the discovery provisions of these rules.

(3) The Court may order evicence upon matters to be taken as established or may order that evidence upon matters be refused as against a party subject to subdivision (B) (2) of this rule.

(4) The court may enter total or partial judgment by default or dismissal with prejudice against a party who is responsible under subdivision (B) (2) of this rule if the court determines that the party's conduct has or threatens to so delay or obstruct the rights of the opposing party that any other relief would be inadequate.

Trial Rule 60(b) of the Federal Rules Civil Procedure is as follows:

(b) Mistakes; inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged,

or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C.., §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Trial Rules 37 (b) and (d) of the Federal Rules of Civil Procedure are as follows:

(b) Failure to Comply with Order.

(1) Sanctions by court in District Where Deposition is Taken.

If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31 (a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the

action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A) (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

***

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6)

or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B) and (C) of subdivision (b) (2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

III

QUESTIONS PRESENTED FOR REVIEW

1. Whether a substantial federal question is presented when the petitioner's personal injury action was dismissed with prejudice at the trial level pursuant to Trial Rule 37(B) of the Indiana Rules of Trial Procedure which is comparable to Rule 37 of the Federal Rules of Civil Procedure, due to his or his counsel's thwarting of the discovery process by refusing to allow the deposition of the petitioner's treating physician at the eleventh hour after considerable notice had been given of the pending deposition and, further, after the petitioner's or counsel for the petitioner's failure to timely pay the attorneys' fees of the counsel for the defendants incurred during their attempts to obtain the relevant and necessary discovery as ordered by the Trial Court.

2. Whether this Court lacks jurisdiction to review the matters asserted by the petitioner on the basis that the decision of the Supreme Court of the

State of Indiana is supported by non-federal grounds.

IV

STATEMENT OF THE CASE

The facts as set forth by the petitioner in the opinion of this respondent, do not fully set forth all the pertinent facts necessary for a just review of the petition of the petitioner for a Writ of Certiorari. In light of this, this respondent will set forth a statement of the case containing additional facts not included in the petitioner's statement of the case.

On or about May 6, 1971, the petitioner filed in the Lake Superior Court, Room No. 5, Hammond, Indiana, under Cause No. 571-331, the following Complaint, which omitting captions and signatures, reads as follows:

> Comes now the plaintiff and for cause of action alleges and says:
>
> (1) On Wednesday, May 14, 1969, at approximately 6:30 A.M., the plaintiff was traveling North on Cline Avenue in Hammond approaching the Tri-State intersection. Plaintiff was operating a Buick automobile.

(2) Plaintiff came to a stop, in a fog, waiting for traffic to move ahead. While in a stationary position, his automobile was struck in the rear with great force and violence by defendant Billy D. Martin. Martin, in turn, was struck by another car operated by Randall Czekaj.

(3) The plaintiff was severely injured in the collision due to the negligence of the defendants, and each of them, in operating at a high and excessive rate of speed, considering the weather condition, and not having their vehicles under control so as to avoid colliding with each other and colliding with the plaintiff.

Plaintiff at the time was employed as a mechanic at the Inland Steel Company getting Thirty Dollars ($30.00) per day. He has been unable to work since the accident and will be disabled during the remainder of his life.

In addition, he has incurred medical and hospital bills of approximately Five Thousand Dollars ($5,000.00).

WHEREFORE, plaintiff prays judgment against the defendants in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00) for his costs expended and/or all other just and proper relief.

Thereafter, the cause was venued to

the Porter Superior Court sitting at Valparaiso, Indiana, under Cause Number 71-PSC-1734. In the course of the discovery proceeding, interrogatories were propounded to the petitioner, Rodney A. Logal, and answered by the same. In his answers to interrogatories, Mr. Logan stated that Dr. Bernardo Saavedra treated him for the alleged serious and permanent personal injuries incurred as a result of the automobile collision upon which his complaint is based. In addition, at a later point in time, the petitioner signed a medical authorization releasing Dr. Bernardo Saavedra to give evidence of his treatment and findings to the respondents in this cause.

Thereafter, on July 19, 1972, the first notice of deposition of Dr. Saavedra, returnable on August 7, 1972, was served on all counsel of record. The deposition of that date was canceled and repeated attempts were made to reset the deposition at the convenience of all counsel and Dr. Saavedra.

On January 5, 1973, notice of Dr. Saavedra's deposition was again served

upon all counsel of record by certificate of service, returnable on January 26, 1973. The record indicates that the petitioner's counsel received said notice of deposition on January 8, 1973. On January 25, 1973, between the hours of 3:30 p.m. and 4:00 p.m., Billy D. Martin's counsel, Fred M. Stults' received a telephone call from an individual identifying himself as Mr. Brown from the petitioner's counsel's office who stated that Attorney Crumpacker, counsel for the petitioner at that time, was going to file some objections to the taking of Dr. Saavedra's deposition. Attorney Stults advised Mr. Brown that unless the Judge or Court ordered otherwise, Dr. Saavedra's deposition would proceed as scheduled.

Dr. Saavedra's office also was notified on January 25, 1973 by a telephone call from the office of Attorney Crumpacker and was advised by the individual speaking not to proceed with the deposition because Mr. Owen M. Crumpacker had filed a Motion to Quash. The Motion to Quash was served for the first time

on Dr. Saavedra on January 26, 1973, the day of the scheduled deposition.

On January 26, 1973, Dr. Saavedra was served by Attorney Fred M. Stults with an ordinary Witness Subpoena and, pursuant to notice, the attorneys for the various defendants and the court reporter appeared at Dr. Saavedra's office to take the doctors deposition. Mr. Brown of Attorney Crumpacker's office was also in attendance and at that time again instructed Dr. Saavedra not to testify. Mr. Brown was not an attorney but merely a lay person in the employ of Attorney Crumpacker. The counsel of record for Rodney A. Logal did not appear, nor make any attempt to appear.

Based upon Mr. Brown's assertions and the advice of his own counsel, Dr. Saavedra refused to give testimony at the deposition.

On March 6, 1973, the defendant, Billy D. Martin, filed a Motion to Compel Discovery and for Sanctions against the petitioner and Dr. Saavedra. In this motion, the counsel for the defendant set out the reasons for sanctions

against the plaintiff and Dr. Saavedra. The motion contained a schedule of time showing fifteen hours spent by defendant Martin's attorney. The time schedule was submitted in support of a request for attorney's fees and costs.

This motion was assigned for hearing and oral argument on September 19, 1973, by the Honorable Bruce W. Douglas, Judge of the Porter Superior Court. On September 17, 1973, just two days prior to the day of hearing for the Motion to Compel Discovery and for Sanctions, the Court, at the petitioner's request, continued said hearing and on September 18, 1973, the Court reset said matter for hearing on October 26, 1973. Both by the plaintiff's counsel's own testimony and by the record itself, it is clear that a notice of the hearing of October 26, 1973 was served upon the plaintiff's counsel by mail as provided for in Rule 5(B)(2) and received by said counsel's office on September 24, 1973.

On October 26, 1973, all of the counsel for the defendants appeared in Court to argue the Motion to Compel

Discovery and for Sanctions. William C. Cruse appeared by his attorney, Karen Hughes; Billy D. Martin appeared by his attorney, Fred M. Stults; and Randall Czekja appeared by his attorney, Rudy Lozano. Dr. Saavedra appeared in person and with his counsel, Martin Kinney of Gary, Indiana. Plaintiff did not appear in person or by counsel. At the hearing, the motion of the defendant Billy D. Martin was orally joined by all defense counsel of record.

After evidence and arguments were concluded, the Court entered an Order finding that the plaintiff "through its attorney has substantially failed to comply with the Indiana Rules of Civil Procedure and that said failure has not been in good faith." (Petitioner's A., pp. 1-2). The Court granted to the defendants' counsels of record $1,200 in attorneys' fees to be paid by the plaintiff or the plaintiff's counsel on or before November 7, 1973. The Court further held that in the event the plaintiff or the plaintiff's counsel failed to comply with its order on or before

November 7, 1973, the Court would enter an "Order of Dismissal" with prejudice against the plaintiff. (Petitioner's A. pp. 1-2).

A copy of the Court's Order of October 26, 1973, was served upon the petitioner's counsel of record and received by him on October 27, 1973. At no time prior to November 7, 1973, did the counsel for the petitioner or the petitioner pay the attorneys' fees as ordered by the Court or take any other affirmative action. On November 9, 1973, the Trial Court entered an Order of Judgment of Dismissal with Prejudice. (Petitioner's A. pp. 2-3). On December 21, 1973, plaintiff filed the following Motion:

> PLAINTIFF'S MOTION TO VACATE AND SET ASIDE THE ENTRY OF NOVEMBER 9, 1973 UNDER TRIAL RULE 55, TRIAL RULE 60(B), BURNS' 2-1069 AND/OR IN THE ALTERNATIVE TO CORRECT ERRORS UNDER TRIAL RULE 59.

The Court heard arguments on the petitioner's Motion on March 14, 1974. At that time, the counsel for the petitioner stated, " . . . and of course the last guys I would ever pay is to

pay an insurance company's lawyers . . . ." He further stated, " . . . but, the last thing in the world I would do would be to contribute to the ruination of the law practice by contributing $1,200 to an insurance company's counsel . . . ."

The Court took the matter under advisement and at the request of the petitioner's counsel, granted the petitioner leave to submit a brief. The petitioner failed to file a brief with the Court and on April 9, 1974, the Court entered an Order denying the petitioner's motion of December 21, 1973. Thereafter, the petitioner appealed this cause to the Court of Appeals of Indiana.

Some months after the submission of the cause to the Appellate Tribunal of the State of Indiana, the petitioner retained new counsel and filed in the Trial Court on December 13, 1974, a Petition to Reinstate based upon Rules 60 and 41 of the Indiana Rules of Trial Procedure. After the hearing, the Trial Court denied the petitioner's motion of December 13, 1974.

ARGUMENT

I. THE QUESTIONS PRESENTED BY PETITIONER ARE CLEARLY UNSUBSTANTIAL IN THAT PREVIOUS DECISIONS OF THE UNITED STATES SUPREME COURT AND OTHER FEDERAL COURTS OF APPEAL CLEARLY SET FORTH THE UNSOUNDNESS OF THE PETITIONER'S POSITION.

The petitioner only cited three cases in support of his contentions. The first of those being Hovey v. Elliot, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed 215 (1897). In that cause, at the state trial level, the defendant's answer was stricken and a judgment entered against him because of his failure to obey an order of the Court during the pendency of the suit. This Court held that it was a denial of due process of law to render a decree on the merits without any hearing whatever. However, Hovey was modified by this Court in Hammond Packing Company v. Arkansas, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed 530 (1909).

The Hammond decision arose out of an action under a state antitrust law. In the action, the defendant company refused to produce books, papers,

and witnesses as the Court ordered. The Court's order was pursuant to state statute. The company purposely refused to comply with the requested discovery based upon the fact that they felt that the act and the trial rules which authorize such discovery were repugnant to the Constitution of the United States. Id. at 330.

This Court held that where there is a refusal to produce material evidence to a defense or claim, as the case may be, it is deemed to be an admission of the particular claim or defense to which the requested evidence is relevant. On the other hand, Hovey v. Elliot involved a denial of the right to defend as a matter of mere punishment. The following is the Court's analysis of the distinction between the two cases.

> Hoovey v. Elliot involved a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession, and a resulting striking out of an answer and a default. The proceeding here taken may therefore find its sanction in the undoubted

right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, as the generating source of the power was the right to create a presumption flowing from the failure to produce. The difference between mere punishment, as illustrated in Hoovey v. Elliot, and the power exerted in this, is as follows: In the former, due process of law was denied by the refusal to hear. In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the other are essential to due process, to preserve in the one and to apply and enforce in the other. Id. at 350-351.

In this cause as in the Hammond decision, refusal to produce necessary and relevant discovery was the main topic of concern at the October 26, 1973 hearing. The testimony of Dr. Saavedra,

a treating physician of the petitioner, was pertinent to the determination of the cause and extent of injury, if any, incurred as a result of the automobile collision set forth in the plaintiff's Complaint. As this Court can ascertain from the reading of the body of the Complaint set out in full in this respondent's Statement of the Case, (pp. 14-15), the damages claimed all rest on the same theory, that being that the petitioner incurred severe personal injuries. It cannot be argued that the deposition of Dr. Saavedra was not pertinent and material to the claim for relief of the petitioner. Therefore, it follows from the Hammond decision that the refusal to allow this discovery was "an admission of the want of merit" in the asserted claim. Id. at 351.

The last case relied upon by the petitioner is that of Link vs. Wabash Railroad Company, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed2d 734, reh.den. 371 U.S. 873, 83 S.Ct. 115, 9 L.Ed.2d 112. This case originated out of the 7th Circuit Court of Appeals. The cause of action

was the oldest case on the court docket.

After repeated delays, the Court dismissed the case with prejudice when the plaintiff's counsel failed to appear at a pre-trial conference without justifiable excuse. The Trial Court dismissed the case on the bases of Federal Rules of Civil Procedure Rule 41(b) for failure to prosecute. In granting certiorari, this Court stated that "[t]he power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts." Id. at 629-630.

In discussing the requirements of due process, this Court stated that "[t]he adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct. Id. at 632.

This Court ruled, therefore, that the Trial Court had the power to dismiss a complaint based upon the failure to

prosecute, even though no notice of its intention to do so was provided nor was an adversary hearing conducted before the action was taken. The only reviewable question before the Court was whether or not the trial court acted within the "permissible range" of its discretion. Id. at 633.

In our fact situation, the actions of the petitioner or that of his counsel substantially delayed the proceedings of the cause. At the hearing of October 26, 1973, one defense counsel alone had a time record showing that he had spent fifteen hours in attempting to arrange for the deposition of Dr. Saavedra. However, unlike the peitioner in Link, Mr. Logal was afforded a hearing with adequate notice. This hearing was even delayed at the request of the counsel of the petitioner. Notwithstanding this, neither the petitioner or his counsel chose to attend.

In order to give the petitioner every opportunity to proceed with his case on the merits, the Court ruled on the date of the hearing in question,

October 26, 1973, that provided that the petitioner, or the counsel for the petitioner, pay the defense counsels' attorney fees that were incurred as a result of the delays caused by his action within thirty days from the date of the hearing, the petitioner could proceed on the merits of his cause of action. However, once again, the order was not complied with.

The petitioner attempts to distinguish the Link decision from the instant fact situation in two regards. The first contention will be handled at a later point in this brief. The second contention revolves around the fact that in the instant case a Trial Rule 60(B) Motion was filed but in Link such a motion was not filed. Trial Rule 60(b) of the Federal Rules of Civil Procedure is substantially similar in pertinent part to Trial Rule 60(B) of the Indiana Rules of Trial Procedure. (pp. 8-9, 4-6). Link does not hold that if a 60(b) Motion was filed, such a motion would have been granted. Rather, Justice Harland, delivering the opinion of the Court, states that such

a motion would only serve to determine whether or not the counsel's failure to attend the pre-trial conference was "other than deliberate or the product of neglect." Id. at 636.

In our fact situation, two Trial Rule 60(B) Motions were filed, and hearings held on two separate occasions, but on neither occasion was it shown that the counsel for the petitioner failed to receive adequate notice of the hearing of October 26, 1973 or of the Court's ruling of that date. In fact, the counsel for the petitioner stated in open court that the failure to comply with the Court's order of October 26, 1973 was a deliberate action on his part.

(Quotes of his statements to the Court are contained on pages 21 through 22 of this respondent's Statement of the Case.)

Rule 37(B) of the Indiana Rules of Trial Procedure provides the same relief for the abuse of or the obstruction of discovery proceedings as those provided for in Rules 37(b) and (d) of

the Federal Rules of Civil Procedure. (pp. 6-8, 9-12.)

In interpreting, reviewing and applying Rule 37 of the Federal Rules of Civil Procedure to individual District Court's actions thereunder, this Court has held as recently as June of 1976, that the only question is whether the Court abused its discretion in the actions taken. National Hockey League v. Metro. Hockey Club, Inc., ___ U.S. _____, 96 S.Ct. 2778, ____ L.Ed2d (1976). When the extreme action of dismissal under Rule 37 is taken by the trial court, this Court seems to require a bad faith action on the part of the remiss party or his counsel, rather than a showing of an inability to comply with the Court's discovery order dispite good faith. National Hockey League v. Metro. Hockey Club, Inc., Supra; Societe Internationale Pour Participations Industrielles et Commerciales, S.A., v. Rogers, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed2d 1255 (1958).

Based upon the fact that crucial interrogatories were outstanding for

17 months due to defense counsel's many requests for extensions of time at the eleventh hour and past the eleventh hour, accompanied by warnings of the Court that their failure to provide certain information by a certain date would result in sanctions under Rule 37, and finally that the interrogatories when filed were not adequate, the Trial Court in National Hockey League ruled that:

> The conduct of the plaintiff's demonstrates the callous disregard of responsibilities counsel owe to the Court and to their opponents. Id. at 2779.

It characterized the counsel's actions as "flagrant bad faith", " . . . when after being expressly directed to perform an act by a date certain, viz., June 14, 1974, they failed to conform and compounded that noncompliance by waiting until five days afterwords before they filed any motions." Id. at 2779-2780.

On review, this Court held as follows:

> The question, of course, if not whether this Court or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District

Court abused its discretion in so doing. E.g., Wright & Miller, Federal Practice and Procedure: Civil §2284 at 765; General Dynamics Corp. v. Selb Mfg. Co., 48 F.2d 1204, 1211 (CA 8, 1973); Baker v. F & F Investment, 470 F2d 778, 781, (CA 2, 1972). Id. at 2780.

As is readily ascertainable from the reading of Trial Rule 37(B) of the Indiana Rules of Trial Procedure, in Indiana the imposition of sanctions by a trial court judge is also discretionary. The Trial Rule commences with the phrase "the court may." (pp. 6-8). Therefore, by the very terms of the Rule, such an imposition of sanctions by an Indiana Trial Court is discretionary with the trial court judge.

A long line of Indiana cases have held that the exercise of discretion by the trial court is not reviewable, it is only the abuse of the power which is reviewable on appeal. Grant v. Grant, 141 Ind.App. 521, 230 N.E.2d 339 (1967); Alexander's Estate v. Alexander, 138 Ind.App. 443, 212 N.E.2d 911 (1966). The Supreme Court of the State of Indiana held that in the instant case there was no abuse of discretion in dismissing

this action. Logal v. Cruse, ___ Ind. ____, 268 N.E.2d 235 (1977). (Petitioner's A. pp. 38-39).

The Trial Court specifically set forth in its order of October 26, 1973, that the petitioner through his attorney had not acted in good faith. (Petitioners A. p. 1.) There are many facts to substantiate this finding, i.e. the timeliness of the filing of the Motion to Quash, as well as the manner in which the deposition was physically disrupted; and the failure of the counsel for the petitioner or the petitioner to appear at the hearing on the Trial Rule 37 Motion after the same had been continued for the convenience of the petitioner's counsel at his request. Thereafter, the bad faith actions of the petitioner and his counsel continued with the refusal to comply with the Trial Judge's order to pay the attoneys' fees within the thirty day limitation, in fact no affirmative actions were taken within the thirty days, and finally after the entering of the Order of Dismissal by the Trial Court on November 9, 1973, the failure

of the counsel of the petitioner to file any motions to vacate said order until 42 days after the entry of the final Order of Dismissal. A Court would be hard pressed to find that the petitioner, through his counsel, acted in good faith herein or that the Court abused its discretion in entering the Orders of October 26, 1973 and November 9, 1973. (Petitioners A. pp. 1-3).

As in Indiana, Rule 37 of the Federal Rules of Civil Procedure, " . . . allows a Court all the flexibility it might need in framing an order appropriate to a particular situation." Societe Internationale v. Rogers, Supra at 208. See also, National Hockey League v. Metro. Hockey Club, Inc., Supra; and Hendricks v. Alcoa Steamship Co., 32 F.R.D. 169 (1963), (where a Court awarded attorney's fees as a condition of reinstatement of cause after a Rule 37 dismissal). In that Rule 37 of the Federal Rules of Civil Procedure and Rule 37 of the Indiana Rules of Trial Procedure by their language contemplate flexibility in the framing of an Order

to fit a particular situation, the first attempt to distinguish the decision of Link v. Wabash Railroad Company, Supra. by the petitioner on pages 12-13 of his Petition is unfounded.

Finally, the petitioner asserts that his constitutional rights under the 5th and 14th Amendments were violated because he did not receive personal notice of the Court's Orders of October 26, 1973 and November 9, 1973. There is no question that in all instances petitioner's counsel received notice as provided for in Rule 5(B) of the Indiana Rules of Trial Procedure, the constitutionality of which is not contested by the petitioner. (pp. 2-3).

This Court held that "[t]here is certainly no merit to the contention . . ." Link v. Wabash, Supra. at 633. The Link Court specifically stated as follows:

> Petitioner voluntarily chose his attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of his freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer--agent

and is considered to have "notice of all facts, notice of which can be charged upon the attorney." Smith v. Ayer, 101 U.S. 320, 326, 25 L ed 955, 958. Id. at 633-634

By footnote, this Court further explained its position and the basis of the same as follows:

> And if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. But keeping this suit alive merely because plaintiff should not be penalized for the admission of his own attorney would be visiting the sins of plaintiff's lawyer upon the defendant. Moreover, this Court's own practice is in keeping with this general principal. For example, if counsel files a Petition for Certiorari out of time, we attribute the delay to the petitioner and do not request an explanation from the petitioner before acting on the petition. Id. at 634, n. 10.

In keeping with the Link decision, the Court in National Hockey League v. Metro. Hockey Club, Inc., Supra., impliedly held the petitioner bound by the action of its counsel in failing to timely respond to the Court's orders. It is, therefore, this respondent's

position that the petitioner's remedy, if any, lies not in this Court but rather against his attorney of record at the times in question.

II. THE DECISION OF THE SUPREME COURT OF THE STATE OF INDIANA IS SUPPORTED BY NONFEDERAL GROUNDS.

This Court lacks jurisdiction to review a decision of a state court based upon nonfederal grounds. Jankovich v. Indiana Toll Road Comm., 379 U.S. 487, 85 S.Ct. 493, 13 L.Ed2d 439 (1965). See also Duncan v. Tennessee, 405 U.S. 127, 92 S.Ct. 785 31 L.Ed2d 86 (1972); Henry v. State of Mississippi, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed2d 408 (1965); Herb v. Pitcairn, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed 789 (1945). If the procedural rules involved serve a legitimate state interest, the case is not subject to review by this Court. Henry v. State of Mississippi, Supra.

In the case of Duncan v. Tessessee, Supra., the defendants were convicted of armed robbery and they appealed. This Court granted certiorari to consider the questions seemingly presented under the constitutional guarantee

against double jeporady. But after briefing and oral argument, the Court held that such questions were so interrelated with the rules of criminal pleading peculiar to the State of Tennessee, the constitutionality of which was not at issue, as not to warrant the exercise of certiorari jurisdiction of the Court. Similarly, in our fact situation, the constitutionality of the Indiana Trial Rules involved is not at issue and are so intricately woven with the claims of the petitioner as not to warrant the extension of certiorari jurisdiction.

As the Indiana Court of Appeals pointed out in their review of this case, the trial court was not only motivated by Trial Rule 37(B) but also by the petitioner's failure to properly prosecute the claim. For as this Court noted in Link v. Wabash Railroad Company, Supra.,

> The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the [Courts]. Id. at 629-630 cited in Farinelli v. Campagna, ____ Ind.App. ____ 338 N.E.2d 299,300 (1975). See also Clark County State

Bank v. Bennett, ____ Ind.App. ____, 336 N.E.2d 663 (1975).

In addition to docket control and the speedy disposition of cases, the rights of the defendants must be considered as well as those of the petitioner. For as it is stated by this Court in Link, "the sins of the plaintiff's lawyers should not be visited upon the defendant." Supra. at 634, n. 10. Therefore, legitimate state interests are served by Trial Rules 5(B) and 37(B).

VI

CONCLUSION

Wherefore, for the reasons set forth in the above argument, this respondent requests that the United State Supreme Court deny the petitioner's Petition for Writ of Certiorari to the Supreme Court of Indiana.

Respectfully submitted,

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